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In The

Supreme Court of the United States

October Term, 1997

STEVEN DOUGLAS JENKINS, *et al.*,

Petitioners,

vs.

BOBBY LEE MEDFORD, individually and in his capacity as Sheriff of Buncombe County, North Carolina, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case was decided in the courts below on defendant/respondent's (hereafter defendant or Sheriff Medford) Motion to Dismiss under Rule 12(b)(6). When ruling on a Motion to Dismiss, the factual allegations of the complaint are accepted as true. *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, 2356 (1996). The statement of the facts is therefore drawn from plaintiffs/petitioners' Amended Complaint.

This case arises out of defendant Bobby Medford's decision about how to staff and organize his office after he was elected Sheriff of Buncombe County in November 1994. Defendant Medford defeated the incumbent sheriff, Charles Long, in the election. Each plaintiff had been employed as a deputy sheriff by former Sheriff Long. Five days before taking office, Medford advised each plaintiff that he was not going to offer them positions as deputies when he took office on December 5, 1994.

Plaintiffs allege that Sheriff Medford promised his supporters and workers associated with his campaign jobs or promotions if he was elected sheriff, that plaintiffs competently performed their duties as deputies for former Sheriff Long and that none of them occupied policy-making or confidential positions. Plaintiffs further allege that they "worked for and otherwise supported opposition candidates in their political campaigns against Bobby Medford" and that they "were . . . terminated for failing to associate themselves politically with the campaign organization of defendant Medford, for speaking in favor of the opposition candidates and for associating politically with Medford's opponents," so that positions could be made available for Medford's supporters. Plaintiffs contend that Sheriff Medford violated their first amendment rights by not retaining

them as deputies when he took office. Plaintiffs filed suit under 42 U.S.C. § 1983, in June 1995, seven months after Sheriff Medford took office.

Sheriff Medford filed a Motion to Dismiss under Rule 12(b)(6) asserting that as a newly elected sheriff he had the right to organize his office regardless of whether or not plaintiffs had supported opposition candidates in the election, that in the alternative he was entitled to qualified immunity and that plaintiffs did not state a claim against Sheriff Medford in his official capacity because they did not identify the entity for which he was making custom or policy and that the appropriate entity would be the State of North Carolina such that Sheriff Medford is not a person in his official capacity or the claims are barred by the 11th Amendment. Magistrate Judge Toliver Davis issued a Memorandum and Recommendation, recommending that the Motion to Dismiss be allowed on the grounds that plaintiffs had not alleged a constitutional violation and in the alternative that Sheriff Medford was protected by the 11th Amendment as to the claims against him in his official capacity because the true party interest is the state of North Carolina and that the claims against Sheriff Medford in his individual capacity should be dismissed under qualified immunity because the law in this area was not clearly established. Plaintiffs objected to the Memorandum and Recommendation. District Judge Thornburg declined to adopt the Memorandum and Recommendation and held that the Motion to Dismiss should be denied in all respects. Sheriff Medford appealed to the Fourth Circuit Court of Appeals in accordance with *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (interlocutory appeals allowed from denials of claims of qualified immunity) and *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) (interlocutory appeals allowed from denial of 11th Amendment claims). About two weeks after argument before the three-judge panel, the Fourth Circuit on its own motion decided to consider the case *en banc*.

The Fourth Circuit issued its *en banc* decision on August 7, 1997. The Court noted that Sheriff Medford "would be entitled to qualified immunity," *Jenkins v. Medford*, 119 F.3d 1156, 1162 n. 37 (4th Cir. 1997), and held that in light of the legal relationship between Sheriffs and their deputies in North Carolina that political considerations are appropriate when a Sheriff selects his deputies. The Fourth Circuit therefore remanded the case with directions that plaintiffs' action be dismissed.

REASONS FOR DENYING THE WRIT

1. The Fourth Circuit properly applied the criteria set forth in *Elrod* and *Branti*.

In *Elrod v. Burns*, 472 U.S. 347 (1996), the Court considered a claim by former deputy sheriffs in Cook County, Illinois that their First Amendment rights had been violated when a newly elected Sheriff laid them off because they were not members of the "proper" political party. The Court held in *Elrod* that a "nonpolicymaking, nonconfidential government employee can [not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod*, 427 U.S. at 375 (Stewart, J. concurring).

Branti v. Finkel, 445 U.S. 520 (1980), again presented the Court with a claim that a public employee was about to be terminated because he was not a member of the "proper" political party. In *Branti*, the employees in question were public defenders. The *Branti* decision refined the holding in *Elrod*.

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether

> the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518

The holding in *Branti* requires the lower courts to analyze "the public office involved" to determine, as a matter of law, if party affiliation is an appropriate requirement for the job. Such an analysis was made by the Court in *Branti*. After stating the test, the Court analyzed the positions in question and held as a matter of law that political affiliation was not an appropriate consideration for the position of public defender. *Branti*, 445 U.S. at 519-20.

Neither *Elrod* nor *Branti* set out a list of public positions for which political affiliation is an appropriate requirement. Each decision noted that an inquiry must be conducted on a case by case basis to determine if political affiliation is an appropriate requirement for the position in question. *Elrod*, 427 U.S. at 367-68; *Branti*, 445 U.S. at 519. In *Elrod*, the Court remanded the case for a determination of whether the positions in question had responsibilities such that political loyalty was an appropriate consideration when filling the position. *Elrod*, 427 U.S. at 368.

Following the precedent established by *Elrod* and *Branti*, the courts of appeals, including the Fourth Circuit, have focused their inquiry on the position involved to determine whether or not political loyalty or affiliation are appropriate considerations. *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990); *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). "The relevant

inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved." *Brown*, 787 F.2d at 168 (*quoted in Jimenez Fuentes*, 807 F.2d at 242 and *Stott*, 916 F.2d at 142). The Fourth Circuit and other courts of appeals have also followed *Elrod-Branti*'s dictate that the issue of whether a particular position is one for which political considerations apply is a question of law for the court. *Stott*, 916 F.2d at 143, 147; *Savage v. Gorski*, 850 F.2d 64, 69 (2d Cir. 1988); *cf. Connick v. Myers*, 461 U.S. 146, 148 n.7 and 150 n.10 (1983) (whether speech is protected by First Amendment is a question of law); *Waters v. Churchill*, 511 U.S. 661 (1994) (*Connick* test to be applied by the court). The Fourth Circuit properly applied these criteria in the instant case by analyzing the responsibilities of deputy sheriffs in North Carolina and the relationship between the Sheriff and his deputies and then determining based on those responsibilities and that relationship whether political affiliation is an appropriate consideration.

Neither *Elrod* nor *Branti* answered the question of whether political affiliation is an appropriate requirement for a deputy sheriff in North Carolina. *Elrod* concerned deputy sheriffs in the three thousand-person Cook County, Illinois sheriff's department. *See Elrod*, 421 U.S. at 377 (Powell, J. dissenting). Furthermore, this Court did not determine that the positions in question in *Elrod* were not the type for which political considerations apply, instead the Court remanded the case for consideration of this issue. Thus, plaintiffs' assertion in the instant case that *Elrod* somehow forecloses the Fourth Circuit's decision is simply incorrect. *Branti* considered a public defender position in New York State and thus could not have conclusively determined the issue for deputy sheriffs in North Carolina.

The Fourth Circuit properly applied the *Elrod-Branti* analysis to this case. The position of deputy sheriff is one defined by statute and case law that is over a century old. It was

appropriate for the court to consider the statutes and case law when ruling on the Motion to Dismiss. The Fourth Circuit thoroughly explained the role of deputy sheriffs in North Carolina, noting that the deputy is the alter ego of the sheriff, that the sheriff is liable "for the act or omission of his deputy as he is for his own," and that "the sheriff alone is responsible to the party injured." *Jenkins*, 119 F.3rd at 1163 n.55. This relationship described by the Fourth Circuit applies to all deputies regardless of rank. All deputies stand in the same legal relationship with the Sheriff and all deputies have the same responsibilities under the law. Plaintiffs, significantly, do not argue that the Fourth Circuit's analysis of North Carolina law concerning the deputies' responsibilities, their relationship with the sheriff or the sheriff's personal liability for his deputies is incorrect. The Fourth Circuit is also in a better position to interpret North Carolina law than the Supreme Court. *See McMillian v. Monroe County*, 117 S.Ct. 1734, 1737 (1997).

This case presented the first opportunity for the Fourth Circuit to consider whether political affiliation is an appropriate job qualification for deputy sheriffs in North Carolina. The Fourth Circuit properly applied the *Elrod-Branti* analysis and determined that political affiliation is an appropriate consideration. There is no need for the Court to review the Fourth Circuit's proper application of the *Elrod-Branti* analysis.

2. The *Elrod-Branti* analysis was appropriate in this case.

Plaintiffs contend that even if the *Elrod-Branti* analysis conducted by the Fourth Circuit was appropriate, this Court should grant review to determine whether the case should also have been analyzed under *Pickering v. Board of Education*, 391 U.S. 563 (1968). Plaintiffs' Complaint and Amended Complaint attempt to allege a case of political retaliation. Plaintiffs alleged

"defendant Medford terminated the plaintiffs in order to create job vacancies for the supporters associated with his political campaigns. The plaintiffs were therefore terminated for failing to associate themselves politically with the campaign organization of defendant Medford, for speaking in favor of the opposition candidates and for associating politically with Medford's opponents." *Amended Complaint*, par. 28. This is a classic allegation of political patronage which were the allegations presented to the Court in *Elrod* and *Branti*. The tests in *Elrod* and *Branti* are designed to deal with this type of situation. Significantly, the Magistrate Judge, District Court Judge and Fourth Circuit each analyzed this case using the *Elrod-Branti* criteria.

Plaintiffs' attempt to persuade the Court to review this case to determine if the balancing test from *Pickering* should have been applied is baseless. Plaintiffs' complaint is clear that they are basing this case not on free speech but on political activity. They have not identified any speech of the type presented in *Pickering* to support their claim.

Plaintiffs rely on *O'Hare Truck Service*, 116 S. Ct. 2353 for their argument that a *Pickering* analysis should have been used in the instant case. Significantly, *O'Hare* was construed as "simply an affiliation case" which required an *Elrod-Branti* analysis. *O'Hare*, 116 S. Ct. at 2357.

Elrod spoke of a need to determine whether "political loyalty" was justified for "particular kinds of jobs." *Elrod*, 427 U.S. at 368. *Branti* spoke about protecting a public employee from discharge "based on what he believes" or because he did not have "the proper political sponsorship." *Branti*, 445 U.S. at 515, 516. *Elrod* and *Branti* dealt with political patronage. *Pickering* and *Connick* dealt with free speech claims unrelated to political campaigns or political patronage.

Plaintiffs in the instant case allege they lost their jobs because they were not politically affiliated with Sheriff Medford. Such a claim clearly falls under the *Elrod-Branti* analysis which concerns political patronage and not the *Pickering* analysis which concerns speech on matters of public concern and not political patronage. There is no need to consider whether the *Pickering* test should have been applied in this case.

CONCLUSION

Based on the foregoing, it is respectfully requested that plaintiffs' petition for writ of certiorari be denied.

Dated: December 12, 1997.

Respectfully submitted,

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